Supreme Court, U.S.
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No. _____

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In The Supreme Court Of The United States

OCTOBER TERM 1996

HOUSTON BROKERAGE, INC., HOUSTON INSURANCE BROKERAGE CENTER, AND MIKE PINKERTON, INDIVIDUALLY AND AS AN OFFICER DIRECTOR OF HOUSTON BROKERAGE, INC., AND HOUSTON INSURANCE BROKERAGE CENTER,
Petitioners,

v.

NATHAN McDONALD AND SHARYL McDONALD, INDIVIDUALLY, AND AS NEXT FRIEND AND GUARDIANS OF NATHAN NEIL McDONALD, A MINOR, AND J.N. McDONALD, JR., INDIVIDUALLY AND D/B/A McDONALD EQUIPMENT,
Respondents.

On Petition for Writ of Certiorari to the Thirteenth Court of Appeals, Nueces County, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the deliberately expansive preemption clause of ERISA precludes state law claims against an insurance broker.

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

HOUSTON BROKERAGE, INC., HOUSTON
INSURANCE BROKERAGE CENTER, AND MIKE PINKERTON
PINKERTON, INDIVIDUALLY AND AS
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NATHAN McDONALD AND SHARYL McDONALD, INDIVIDUALLY,
AND AS NEXT FRIEND AND GUARDIANS OF
NATHAN NEIL McDONALD, A MINOR, AND J.N. McDONALD, JR.,
INDIVIDUALLY AND D/B/A McDONALD EQUIPMENT

Respondents.

PARTIES TO THE PROCEEDING

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Houston Insurance Brokerage Center, and
Mike Pinkerton, Individually and as an
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and Houston Insurance Brokerage Center . . . . . Petitioners

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STATUTES:

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OPINIONS BELOW

The decision of the Court of Appeals for the Thirteenth Judicial District of Texas is reported at McDonald v. Houston Brokerage, Inc., 928 S.W.2d 633 (Tex.App--Corpus Christi 1996, writ denied).

STATEMENT OF JURISDICTION

This petition seeks review of the published opinion issued by an intermediate Texas appellate court regarding the scope of ERISA preemption as it applies to insurance agents and brokers. The opinion was issued by the Court of Appeals, Thirteenth Supreme Judicial District of Texas, Corpus Christi on *July 11, 1996*, reversing a summary judgment granted in favor of Petitioners. Petitioners sought review of the court of appeals' opinion by timely filing an Application for Writ of Error in the Supreme Court of Texas, which was denied. The Supreme Court of Texas subsequently denied Petitioners' Motion for Rehearing on ***February 13, 1997.***

This Court has jurisdiction to review the lower state courts' opinion, pursuant to 28 U.S.C. § 1257(a), as it involves the interpretation of The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1001, et. seq. (1985) and its preemption clause that appears at Section 514(a), 29 U.S.C.A. §1144(a). Further, there is a split of authority among the lower state and federal courts of appeals regarding the scope of ERISA's preemption statute as it applies to insurance agents and brokers.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The federal statute relevant to the present action is The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1001, et. seq. (1985) and its preemption clause that appears at 29 U.S.C.A. §1144(a).

STATEMENT OF THE CASE

The health plan at issue was obtained by McDonald Equipment in 1986 through the Business Insurance Trust ("BIT"). The plan was originally marketed by Petitioners to Respondents through Respondents' personal soliciting agent, Robert Jaffe. At the time McDonald Equipment initially subscribed to the BIT, the BIT was underwritten by an insurance policy issued by North Carolina Mutual Life Insurance Company ("North Carolina"). In 1988, the BIT replaced the policy issued by North Carolina with another policy issued by Provident Indemnity Life Insurance Company ("Provident Indemnity").

On September 15, 1989, Neil McDonald, a minor, fell into a reservoir and sustained serious medical injuries in a near drowning accident. Neil McDonald is the son of Nathan and Sharyl McDonald, and the grandson of J.N. McDonald. J.N. McDonald is the sole proprietor and Nathan McDonald the manager of McDonald Equipment. At the time of the accident, all of the McDonalds were either participants or beneficiaries under the McDonald Equipment health plan.

In the eighteen (18) months following Neil McDonald's accident, Respondents contend that McDonald Equipment's premiums increased from approximately $2,000.00 per month to nearly $15,000.00 per month.

Allegedly unable to afford the increased premiums, McDonald Equipment cancelled its health plan, leaving McDonald Equipment without a group medical policy, and consequently, Neil McDonald without continued medical coverage. Shortly thereafter, Respondents filed this lawsuit against Petitioners, alleging state law claims for fraud, misrepresentation, breach of warranty, and deceptive trade practices.

Respondents contend that shortly after the insurance was changed under the BIT, Petitioners made representations that the policies issued by North Carolina and Provident Indemnity were substantially the same. Respondents, however, allege that the two policies provide for substantially different experience-rating methodologies. As such, Respondents contend that had they been advised of the alleged differences, they would have obtained other insurance. Respondents make this argument, despite the fact they had available the advice of their own personal soliciting agent, and despite the fact they made no such inquiries when they originally subscribed to the BIT.

REASONS FOR GRANTING THE PETITION

In 1974, Congress enacted The Employee Retirement Income Security Act of 1974 ("ERISA") in response to national concerns for the continued well-being and security of millions of employees and their dependents directly affected by employee benefit plans. 29 U.S.C.A. § 1001, et. seq. (1985). The express purpose of the Act was to provide minimum standards to not only assure the equitable character of employee benefit plans nationwide, but to assure their financial soundness. 29 U.S.C.A. § 1001(a) (1985). To this end, ERISA is designed to protect the interests of participants in employee benefit plans and their beneficiaries by requiring

"the disclosure and reporting to participants and beneficiaries of financial and other information requested with respect thereto." 29 U.S.C.A. § 1001(b) (1985).

To protect the uniformity of standards nationwide, Congress enacted Section 514(a) that preempts "any and all state laws insofar as they may now or hereinafter relate to any employee benefit plan." 29 U.S.C.A. §1144(a) (1985). This deliberately expansive language was adopted by Congress in favor of a more limited language that would have only preempted state laws relating to the specific subjects covered by ERISA. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95 (1983). Indeed, statements by the bill's sponsor, Representative Dent, championed this achievement by Congress:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the ***field*** of employee benefit plans. With the preemption of the ***field***, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.

120 Cong.Rec. 29197 (1974) (emphasis added).

Since ERISA was enacted, this Court has continually been called on to ascertain Congress' intent and the scope of ERISA's preemption clause as it applies to various state laws and state law claims. See Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95 (1983); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987); Mackey v. Lanier Collection Agency & Serv.,

Inc., 486 U.S. 825, 833 (1988); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990); New York St. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S.Ct. 1671, 1680 (1995). Unfortunately, however, the guidance offered by this Court in these and other opinions has either been ignored or misunderstood by the lower courts, resulting in divided opinions that create inequitable results. For these reasons, this Court should grant Petitioners' Writ of Certiorari, review the case on the merits, and restore the uniformity envisioned by Congress when it enacted ERISA.

I.

THE UNIFORMITY ENVISIONED BY CONGRESS DEMANDS THAT STATE LAW CLAIMS AGAINST INSURANCE AGENTS AND BROKERS BE PREEMPTED

Section 514(a), the preemption clause of ERISA, provides, in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter ***relate to*** any employee benefit plan described in section 4(a) and not exempt under section 4(b).

29 U.S.C. § 1144(a) (emphasis added). The statute, however, does not define the operative term "relate to," leaving the courts to interpret its meaning to reach the uniformity envisioned by Congress.

In Shaw v. Delta Airlines, Inc., this Court provided

the initial framework for determining whether a claim is preempted. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95 (1983). There, this Court--relying on the terms' plain meaning as defined by Black's Dictionary--held that a law "relates to" an employee benefit plan such that it is preempted if it has connection with or reference to such a plan. Id. at 97 n.16. In doing so, this Court looked to ERISA's legislative history, concluding that Congress intended that the words "relate to" be used in their broad sense. Id. at 98. Despite this Court's efforts in Shaw, disagreement regarding the scope of ERISA's preemptive effect continued.

Four years later, this Court addressed the scope of ERISA's preemption clause as it applies to state law claims against an insurer. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987). This Court again recounted the legislative history of ERISA to conclude that the express preemption provisions of ERISA are "deliberately expansive," labelling congressional intent as the "ultimate touchstone" in determining the scope of ERISA's preemption clause. Id. Then, without much discussion, this Court concluded that the plaintiff's state law claims against the insurer undoubtedly met the criteria for preemption under § 514(a). Id. at 48.

Perhaps this Court's broadest statements regarding ERISA preemption of state law were made three years later in Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990). There, this Court considered whether the Texas wrongful discharge law, which provided a common law right of action for employees whose employers discharged them to avoid making contributions to a pension fund, was preempted. Id. at 136. The focus of this Court's preemption analysis was on whether the Texas wrongful discharge statute "related to" an employee benefit plan, "relate to" again being broadly

defined as any connection with or reference to an ERISA plan. Id. at 139. The Court noted that the Texas wrongful discharge statute required the plaintiff to plead both the existence of a plan and the employer's motive to avoid obligations to the plan. Id. at 139-40. Thus, this Court concluded that the Texas law was preempted as the *mere existence* of an ERISA plan would be a critical factor in establishing liability. Id.

Petitioners remain mindful that the scope of ERISA preemption is not unlimited. Indeed, this Court has held that ERISA does not preempt state laws of general applicability which have a "tenuous, remote, or peripheral connection" with employee benefit plans. New York St. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S.Ct. 1671, 1680 (1995). Consequently, "lawsuits against ERISA plans for run-of-the-mill state law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are not preempted. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 833 (1988). Unfortunately, these limitations--while no doubt intended to offer further guidance regarding the deliberately expansive scope of ERISA preemption--have instead served only to disrupt the uniformity originally envisioned and demanded by Congress, resulting in divided opinions by the lower courts.

The practical effect of the divided opinions by the lower courts is that some insurance brokers and agents--like Petitioners here--are being exposed to varying degrees of liability under state laws, while others enjoy the protection offered by ERISA. Consequently, in those jurisdictions where the protection Congress intended to provide has been eroded to exclude insurance brokers and agents such defendants will become the prime target of disgruntled

ERISA beneficiaries or participants who prefer to seek recovery under state law rather than seek recovery under ERISA against others who may be more at fault.

A. The Issue of Whether Claims Against Insurance Agents and Brokers Are Preempted by ERISA Remains Unsettled

Despite the clear and increasingly expansive scope of ERISA preemption as defined by this Court, the lower courts remain divided over the issue of whether claims against insurance brokers are preempted. See e.g. Finn v. Nachreiner Boie Art Factory, 549 N.W.2d 273, 277 (Wis.App. 1996), cert. denied, 117 S.Ct. 508 (1996) (holding that claims against an insurance broker for misrepresentation and fraud in the inducement are preempted); Hollingshead v. Matsen, 40 Cal. Rptr.2d 603, 612-613 (Cal.Ct.App. 1995) (holding claims for negligence, fraud and breach of fiduciary duty against insurance broker preempted); Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 818 (9th Cir. 1992); (holding that negligence claims against insurance broker preempted); Johnson v. Reserve Life Ins. Co., 761 F.Supp. 93, 95 (C.D.Cal. 1991) (claims against insurance broker relating to advice regarding rights under an ERISA plan preempted); compare Perkins v. Time Ins. Co., 898 F.2d 470, 473 (5th Cir. 1990) (holding claims against insurance broker for fraudulent inducement not preempted); Morstein v. National Ins. Servs., Inc., 93 F.3d 715, 722 (11th Cir. 1996) (reversing previous holding that claims against insurance broker for fraud in the inducement were preempted).

1. Some Jurisdictions Hold That Claims Against Insurance Agents and Brokers Are Preempted

One of the most recent cases to address the question of whether claims against an insurance broker are preempted is Finn v. Nachreiner Boie Art Factory, 549 N.W.2d 273, 277 (Wis.App. 1996), cert. denied, 117 S.Ct. 508 (1996). There--like Respondents here below--the plaintiffs sued their insurer and insurance agent for misrepresentation and fraud regarding an ERISA plan. The Wisconsin court, however, reached a result opposite that of the court below here, concluding that the claims against the insurance agent were preempted. Id. In doing so, the court emphasized Congress' intent that the preemption clause be construed broadly as interpreted by this Court in Pilot Life. Id. The Court then acknowledged the existence of authority to the contrary, but concluded that "the reasoning of the case law adhering to a broader interpretation of 'relates to' is more persuasive given Congress's effort to provide ERISA with wide preemptive power." Id. at 277 n.3. Undoubtedly, had this Wisconsin court been faced with the same issues presented to the court of appeals below, it would have reached the same result.

In Johnson v. Reserve Life Insurance Company, the plaintiff (a participant under an ERISA plan) sued her insurance broker for, among other things, negligence, contending the broker failed to properly advise her of her rights under the ERISA plan, rights to policy conversion, and cancellation rights. Johnson v. Reserve Life Ins. Co., 761 F.Supp. 93, 95 (C.D.Cal. 1991). The broker defended that the claims were preempted by ERISA. Id. The court agreed, and granted the broker a summary judgment.

To reach its conclusion, the Johnson court first recognized that the defendant broker (much like Petitioners here below) did not owe plaintiff any duty to provide her advice regarding her rights under the ERISA plan. See Id. at 95. However, because the plaintiff alleged that the broker undertook a duty (as Respondents allege here) to help protect the plaintiff's interests, the broker then owed the plaintiff a duty to act in a non-negligent fashion. Id. The court then reasoned, however, that because plaintiff's damages would require the fact finder to interpret the ERISA plan to determine what benefits the plaintiff would have recovered, and because damages are an element of a claim for negligence, the plaintiff's claim would not exist absent the ERISA plan. Id. at 96. Therefore, the court concluded, the plaintiff's claims were preempted. Id.

Finally, the Ninth Circuit has also held that claims against an agent are preempted. See Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 818-19 (9th Cir. 1992). In Greany, the insureds sued the insurer and agent for negligence in procuring a conversion policy. Id. at 818. At trial, the insurer and agent defended that the negligence claims were preempted, but the trial judge disagreed and allowed the issue of negligence to be submitted to the jury who awarded the insureds damages for the claim. Id. The Ninth Circuit, however, reversed holding that such claims are preempted by ERISA. Id.

2. Some Jurisdictions Hold That Claims Against Insurance Agents and Brokers Are Not Preempted

By contrast, other courts have summarily held that state law claims against insurance agents and brokers are not

preempted by ERISA.

In Perkins, for example, the Fifth Circuit addressed whether a claim that an insurance agent fraudulently induced an insured to surrender coverage under an existing policy in order to participate in an ERISA plan would be preempted. Perkins v. Time Ins. Co., 898 F.2d 470, 473 (5th Cir. 1990). The court held that such a claim was not preempted under its particular facts, reasoning:

> [W]e are not persuaded that this logic should extend to immunize agents from personal liability for their solicitation of potential participants in an ERISA plan prior to its formation.

Id. at 473 (emphasis added). In reaching this conclusion, the court focused primarily on the fact that the insurance agent was not a traditional fiduciary to the ERISA plan, and therefore the claims should not be preempted. Id.

The analysis of the Fifth Circuit was recently adopted by the Eleventh Circuit in Morstein v. National Ins. Servs., Inc., 93 F.3d 715, 722 (11th Cir. 1996), an en banc decision that reverses several previous decisions by the Eleventh Circuit that held claims against insurance agents and brokers were preempted. See Farlow v. Union Central Life Ins. Co., 874 F.2d 791 (11th Cir. 1989); Morstein v. National Ins. Servs., Inc., 74 F.3d 1135 (11th Cir. 1996), reversed, Morstein v. National Ins. Servs., Inc., 93 F.3d 715, 722 (11th Cir. 1996) (en banc); Belasco v. W.K.P. Wilson & Sons, Inc., 833 F.2d 277, 281 (11th Cir. 1987).

In Morstein, a plan beneficiary sued her insurance

agent and insurer who she alleged fraudulently induced her to change benefit plans. Morstein, 93 F.3d at 716. The Eleventh Circuit, in what best can be described as a result oriented opinion, reversed its previous decision and held as follows:

> We now adopt the rationale of the Fifth Circuit as stated in Perkins and hold that when a state law claim brought against a non-ERISA entity does not affect relations among principal ERISA entities as such, then it is not preempted.

Id. In reaching this conclusion, the court relied on Georgia law that considers independent insurance agents to be agents of the insured, not the insurer. Id. at 717 n.2. Consequently, this case should be limited to apply only to insurance agents who are considered to be agents of the insured. See Culpepper v. Protective Life Ins. Co., 938 F.Supp. 794 (S.D. Ala. 1996) (a recent case that considers the effect of the Eleventh Circuit's recent en banc decision in Morstein).

3. There is No Bright Line Preemption Analysis

By comparison, others courts consider the existence of an ERISA covered plan at the time of the alleged wrongful act to be dispositive in the preemption analysis. See Ingram v. American Chambers Ins. Co., 643 So.2d 575 (Ala. 1994). This, of course, only further adds confusion to the preemption analysis.

In Ingram, for example, insureds covered by a group health insurance policy sued their insurer and insurance agent

for, among other things, fraud in the inducement. Id. The basis for the plaintiffs' claims was that the agent fraudulently induced them to give up their existing insurance policy to join an ERISA plan by misrepresenting the ERISA plan's coverage. Id. at 577-78. The agent defended on the basis that the Plaintiffs' state law claims were preempted. Id. at 576. The Alabama Supreme Court disagreed, however, recognizing that the "acts complained of would have taken place before the [plaintiffs] had any involvement with a covered plan." Id. at 578. Accordingly, the court held that such claims could not be subject to ERISA preemption. Id. Interestingly, had this analysis been applied by the court of appeals below, it would have reached a different result because the alleged misrepresentations of which Respondents complain occurred after the creation of the ERISA plan.

Finally, there remain other courts that find the question of whether a remedy would exist under ERISA to be the critical inquiry when determining whether state law claims are preempted. See International Resources, Inc. v. New York Life Ins. Co., 950 F.2d 294, 298 (6th Cir. 1991). Meanwhile, other courts find such a concern to be of no moment. Custer v. Pan American Life Ins. Co., 12 F.3d 410, 418 (4th Cir. 1993); Cannon v. Group Health Serv. of Ok., Inc., 77 F.3d 1270, 1273 (10th Cir. 1996). Indeed, such decisions further demonstrate the division among lower courts that exists not only on the question of whether claims against insurance agents and brokers are preempted, but also on the analysis that should be applied to answer that question. For these reasons, this Court should grant Petitioners' Petition for Writ of Certiorari, review this case on the merits, and restore the uniformity envisioned by Congress when it enacted ERISA.

B. The Divided Opinions of the Lower Courts Subjects Insurance Agents and Brokers to Jurisdiction Dependent Treatment

Further, the impact of the divided opinions of the lower courts is that agents and brokers will be subject to disparate treatment dependent only on the jurisdiction in which the claim is filed.

First, the lack of a bright line rule regarding whether claims against insurance agents and brokers are preempted creates a piece-meal situation where some insurance agents and brokers--like Petitioners--will be forced to defend themselves against state law claims that potentially carry with them varying degrees of economic exposure (i.e. punitive or exemplary damages), while insurance agents or brokers in other jurisdictions enjoy the protection offered by ERISA's deliberately expansive preemption clause.

Second, allowing state law claims against insurance agents or brokers may have a chilling effect on the willingness of the agents and brokers (who can often facilitate the free flow of information between insurers and beneficiaries) to provide any information relating to plans other than that which is required by law or offered by the insurer for fear of incurring liability. This, of course, could have a direct and disruptive effect on the ERISA plan itself, making it more difficult for beneficiaries to obtain necessary information related to such plans--a result that belies the express purpose of ERISA. Interestingly, such a result is exactly that which the Eleventh Circuit sought to avoid in its Morstein decision. See Morstein, 93 F.3d at 723 (stating that if ERISA preempts a beneficiary's potential claim for misrepresentation, beneficiaries choosing among various plans

will no longer be able to rely on the representations of the insurance agent regarding the terms of the plan).

Finally, the disruptive effect of the lower court's divided opinions reaches beyond the jurisdiction dependent treatment of insurance agents and brokers. Specifically, by leaving insurance agents or brokers unprotected by ERISA's preemption clause, they will no doubt become the increasing target of disgruntled ERISA beneficiaries who will choose to pursue state law claims against the agents or brokers rather than pursue the more limited remedies available against others under ERISA. Indeed, logic dictates that Plaintiffs will be more willing to risk suing defendants (agents or brokers) of questionable liability where the potential damages available exceed those available against others under ERISA.

II.
CONCLUSION

For these reasons, Petitioners respectfully request this Court grant a writ, take jurisdiction, reverse the court below, and reinstate the summary judgment granted Petitioners by the trial judge, making it clear that the deliberately expansive preemption clause of ERISA precludes state law claims against an insurance broker.

Respectfully Submitted,

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APPENDIX

NUMBER 12-94-536-CV

COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI

NATHAN MCDONALD AND SHARYL MCDONALD, INDIVIDUALLY, AND AS NEXT FRIEND AND GUARDIANS OF NATHAN NEIL MCDONALD, A MINOR, AND J.N. MCDONALD, JR., INDIVIDUALLY AND D/B/A MCDONALD EQUIPMENT,
Appellants,

v.

HOUSTON BROKERAGE, INC., ET AL.,
Appellees.

On appeal from the 130th
Judicial District Court
of Matagorda County, Texas.

OPINION

Before Justices Dorsey, Hinojosa, and Rodriguez
Opinion by Justice Rodriguez

Appellants, plaintiffs below, appeal from an adverse summary judgment entered in favor of appellees, Houston Brokerage, Inc., Mid-West Properties, Inc., Houston Insurance Brokerage Center, and Mike Pinkerton, individually and as an Officer/Director of Houston Brokerage, Inc., and Houston

Insurance Brokerage Center.
We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

In 1986, McDonald Equipment, a sole proprietorship, owned by J.N. McDonald, Jr., obtained group medical insurance for its employees through the Business Insurance Trust ("BIT"), which is a "multiple employer welfare arrangement" as defined in Section 3(40)(A) of the Employee Retirement Income Securtity Act of 1974 ("ERISA"), 29 U.S.C. § 1002(40)(A). At the time McDonald Equipment subscribed to the BIT, the BIT was underwritten by an insurance policy issued by North Carolina Mutual Life Insurance Co. ("North Carolina Mutual").

Although participation in the program was voluntary, McDonald Equipment paid the premiums for its employees and a portion of the premiums for employees' dependents. McDonald Equipment also distributed enrollment and claim forms.

In 1988, the BIT replaced the insurance policy issued by North Carolina Mutual with another policy issued by Provident Indemnity Life Insurance Company ("Provident Indemnity"). Shortly thereafter, Houston Brokerage, Inc. ("HBI"), a non-fiduciary insurance broker that marketed the BIT, represented to McDonald Equipment's insurance agent that the policies issued by North Carolina Mutual and Provident Indemnity were substantially the same, when in fact they were not. Although both policies were experienced rated, appellants claim that the two policies provided for substantially different experience-ratings methodologies.

Nathan McDonald, son of J.N. McDonald, Jr., was employed by McDonald Equipment. In 1989, Nathan's son was involved in a near drowning accident, leaving him a spastic quadriplegic. Appellants claim that, within a period of eighteen months after the accident, Provident Indemnity increased McDonald Equipment's premium rates from approximately $2,000 per month to more than $15,000 per month. McDonald Equipment, unable to afford the increased premiums, was forced to cancel its subscription to the BIT, leaving McDonald Equipment with a group medical policy for its employees and Nathan McDonald without medical coverage for his son.

On August 15, 1991, McDonald Equipment, J.N. McDonald, Jr., Nathan McDonald and his wife filed suit against defendants, HBI, Mid-West Properties, Inc., Houston Brokerage Center, and Mike Pinkerton. They alleged state law claims for fraud, misrepresentation, breach of warranty, and deceptive trade practices.

Defendants moved for summary judgment on the basis that ERISA preempted Plaintiffs' state law claims. They also argued that because of a summary judgment entered in a related federal case, *McDonald v. Provident Indem. Life Insurance Co.*, No. G-91-321 (S.D. Texas 1993),[1] the

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[1] In McDonald v. Provident Indem. Life Ins. Co., the same plaintiffs sued Provident Indemnity, the BIT, and the BIT's trustee in the U.S. District Court for the Southern District of Texas, asserting various Texas state law claims, as well as alternative ERISA claims for breach of fiduciary duty. The federal court granted the defendants' motion for partial summary judgment, holding that the group medical policy offered to McDonald Equipment's employees was an ERISA

Plaintiffs' claims were barred by res judicata or collateral estoppel. The Matagorda County District Court granted the motion for summary Judgment.

STANDARD OF REVIEW

Summary Judgment is proper when the movant shows by uncontroverted or conclusive summary judgment evidence that no issues of material fact exists and that he is entitled to judgment as a matter of law. In deciding whether a disputed material fact issue precludes summary judgment, a reviewing court will take as true all evidence favorable to the nonmovant and will indulge all reasonable inferences and resolve all doubts in the nonmovant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

Here, the defendants moved for summary judgment by asserting the affirmative defenses of collateral estoppel, res judicata, and ERISA preemption. A properly pleaded affirmative defense, supported by uncontroverted summary judgment evidence, may serve as the basis for a summary judgment. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991). When a defendant moves for summary judgment on its affirmative defenses, it must conclusively

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plan, and that ERISA section 514(a) preempted the plaintiffs' state law claims against Provident Indemnity, the BIT, and the BIT's trustee. Following a bench trial on the remaining ERISA claims, the district court entered judgment in favor of the Defendants. On August 9, 1995, the Fifth Circuit affirmed the district court's rulings. *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234 (5th Cir. 1995) cert. denied, 116 S.Ct. 1267 (1996).

prove all the essential elements of its defenses as a matter of law, leaving no issues of material fact. *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex, 1984), *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

When a movant asserts multiple grounds for summary judgment, and the order does not state the theory upon which the trial court based its judgment, as is the case here, the nonmovant must show on appeal the failure of at least one element of each theory asserted. See *Gibbs v. General Motors Corp.*, 450 S.W. 2d 827, 828 (Tex. 1970). Otherwise, we affirm the summary judgment if any one of the theories advanced it meritorious. *Martinez v. Corpus Christi Area Teachers Credit Union*, 758, S.W.2d 946, 950 (Tex. App.--Corpus Christi 1988, writ denied).

RES JUDICATA

Because the first case was decided in federal court, federal law controls the determination of whether res judicata will bar the later state court proceedings. *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 718 (Tex. 1990). Under federal law, res judicata, will apply if: 1) the parties are identical in both suits; 2) the prior judgment is rendered by a court of competent jurisdiction; 3) there is a final judgment on the merits; and 4) the same cause of action is involved in both cases. Id at 718.

Appellants argue that res judicata does not bar their state lawsuit because appellees were not parties to the federal lawsuit. Appellees concede that they were not named parties to the federal litigation but maintain that "as subgeneral agents or insurance brokers to the original transaction in

question, [they] clearly have privity with the third-party administrators and insurance company (federal court defendants) which ultimately wrote and administered the insurance policy in question."[2]

A non-party defendant can assert res judicata so long as it is in privity with the named defendants. *Gulf Island-IV, Inc. v. Blue Streak-Gulf* IS OPS, 24 F.3d 743, 746 (5th Cir. 1994) (rejecting the argument that res judicata applies only to the party against whom the plea is asserted). "A non-party . . . is adequately represented where a party in the prior suit is so closely aligned to her interest as to be her virtual representative. [citations omitted] This requires more than a showing of parallel interest -- it is not enough that the non-party may be interested in the same questions or proving the same facts." Id. at 747 (quoting *Eubanks v. F.D.I.C.*, 977 F.2d 166, 170 (5th Cir. 1992)).

In *Gulf Island-IV, Inc.*, Gulf Island-IV owned a vessel that had capsized in the Gulf of Mexico while under the operation of a company called Blue Streak. Gulf Island-IV first sued Wausau, its insurance carrier, with whom it settled. Gulf Island-IV later sued Blue Streak, who asserted the defense of res judicata based on the earlier suit against Wausau. In finding that Blue Streak did not meet the

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[2] Curiously, earlier in their motion, HBI and Pinkerton distance themselves from the transaction, which they now attach themselves to as privies, by stating that their "sole involvement in this case was as a facilitator between the soliciting agent, Robert Jaffe, and the insurance company in question, Provident, regarding McDonald Equipment Company's enrollment forms and other application materials that were required to procure the insurance in the beginning."

"identity of parties" requirement, the court reasoned that Gulf Island-IV sued Wausau in the preceding suit not as a third party complaining of the negligence of Blue Streak, but rather as a named insured under its Wausau policy. Gulf Island-IV, 24 F.3d at 747. The court further reasoned that, although Wasau's interest in certain respects may have been parallel to Blue Streak's in the prior suit, Wausau was now standing in the shoes of Blue Streak, and its interests were not aligned with those of Blue Streak as they conceivably would be in a third-party action. Id.

Likewise, in the present suit, appellants sued Provident Indemnity and French, not as a third party complaining of appellees' alleged fraud, misrepresentations, breach of warranty, and deceptive trade practices, but rather as a named insured under its Provident Indemnity group health policy. Based on appellants' complaint in the federal suit, Provident Indemnity and French were not standing in the shoes of appellees, and their interests were not aligned. Provident Indemnity and French were defending themselves against allegations of self-dealing and breach of fiduciary duties as trustees, not against appellees' alleged fraud, misrepresentations, breach of warranty, and deceptive trade practices. Because appellees were not parties to the federal litigation, or in privity with a party to the federal litigation, the "same party" requirement of res judicata is not satisfied. We hold, therefore, that res judicata could not have properly served as the basis for the summary judgment.

COLLATERAL ESTOPPEL

Collateral estoppel, or issue of preclusion, bars relitigation of fact or law that was actually litigated and essential to the judgment in the prior suit. *Van Dyke v.*

Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381, 384 (Tex. 1985). A party seeking to assert the bar of collateral estoppel must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. *Sysco Food Serv. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994)[3]; *Mower v. Boyer*, 811 S.W.2d 560, 563 (Tex. 1991); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 820 (Tex. 1984). With regard to the third element, it is only necessary that the party against whom the doctrine is asserted was a party or in privity with a party for the first action. *Sysco*, 890 S.W.2d at 802. Here, even though appellees were not named defendants in the federal suit, this element is satisfied because appellants were parties in the federal suit.

We next consider whether the first and second elements of collateral estoppel have been satisfied. Appellants brought the federal suit[4] against Provident Indemnity, the BIT, and Arden O. French, Jr., as trustee of the BIT, alleging misconduct in setting premiums and handling claims. The state suit alleged fraud, misrepresentation, breach of warranty, and deceptive trade practices regarding appellants' original procurement of the policy and its subsequent transfer from North Carolina Mutual

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[3] Even though the claim of collateral estoppel stems from a previous federal court action, a decision on which law to apply is not required because there is little difference between the Texas and federal formulations of collateral estoppel. *Sysco*, 890 S.W.2d at 801 n.7.

[4] This suit was filed nearly a month after the state suit.

to Provident Indemnity.

Thus, the state suit claims were different from the federal claims and they were directed against different defendants.

Insofar as "full and fair litigation" means actual litigation in the previous suit of the same fact issues (*Puga v. Donna Fruit Co.*, 634 S.W. 2d 677, 678 (Tex. 1982), we conclude that the specific preemption issue presented to the state court was not estoppel because it was neither fully and fairly litigated in the federal suit, nor essential to the federal court judgment. We hold that appellees' collateral estoppel argument could not have been the basis for granting their motion for summary judgment.

ERISA PREEMPTION

ERISA preemption of state law claims requires a two-fold inquiry which determines (1) whether an ERISA-covered plan has been established, and if so (2) whether ERISA preempts the state law claims at issue.

In *McDonald v. Provident Indem. Life Ins. Co.*, No. G-91-321 (S.D. Texas 1993), affirmed, 60 F.3d 234 (5th Cir. 1995), cert. denied, 116 S.Ct. 1267 (1996), the federal district court specifically held that McDonald's subscription to the BIT established an ERISA-covered plan. Reconsideration of this issue, as requested by appellants, is barred by a collateral estoppel.

We next consider, therefore, whether ERISA preempts appellants' state law claims.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the Act. While the scope of the preemption is broad, it is not unlimited. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S.85, 96-97 (1983), for example, the Supreme Court held that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, it if has a connection with or reference to such a plan."

ERISA does not preempt state laws of general applicability which have only a "tenuous, remote, or peripheral." connection with employee benefit plans. *New York State Conference of Blue Cross & Blue Sheild Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671, 1680 (1995); *Shaw*, 463 U.S. at 100 n. 21. Consequently, "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by ERISA plan" are not preempted, even though they have an obvious effect on the plans. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 833 (1988).

Most courts have held that ERISA does not preempt state law claims against non-fiduciaries arising out of the provision of services to ERISA-covered plans. See, e.g., *Airparts Co. v. Custom Benefit Serv. of Austin*, 28 F.3d 1062 (10th Circuit 1994) (ERISA does not preempt suit by plan's trustees against an actuarial firm for negligence, implied indemnity, and fraud in connection with plan amendment and the calculation of benefits); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 540 (7th Cir. 1991) (ERISA beneficiaries may bring state law malpractice suits against plan consultants); *Painters Dist. Counsel No. 21 Welfare Fraud v. Price Waterhouse*, 879 F.2d 1146, 1153 n.7 (3rd Cir.

1989)("ERISA does not generally preempt state professional malpractice actions"), *Cook Wholesale v. Connecticut Gen. Life Ins. Co.*, 898 F. Supp. 151 (W.D.N.Y. 1995); *Carpenters' Local Union No. 964 Pension Fund v. Granik Silverman*, 1995 U.S. Dist. LEXIS 8663 (S.D.N.Y. June 22, 1995)(ERISA does not preempt state law claims against plan attorney for malpractice and breach of contract), *Berlin City Ford v. Roberts Planning Group*, 864 F. Supp. 292 (D.N.H. 1994) (ERISA does not preempt action against service provider for negligence in the formulation, establishment, and administration of ERISA-covered plans); *Horton v. Cigna Individual Fin. Serv. Co.*, 825 F. Supp. 852 (N.D. III. 1993) (ERISA does not preempt state law claims against plan consultant for breach of contract, fraud, misrepresentation, and breach of fiduciary duty in connection with the provision of administrative and actuarial services to the plan).

Similarly, most courts have held that state law claims arising out of the sale of insurance products to plans or plan sponsors are not preempted by ERISA. In *Perkins v. Time Ins. Co.*, 898 F.2d 470, 473 (5th Cir. 1990), for example, the plaintiff sued an insurance agent claiming that the agent fraudulently induced him to surrender his previous medical insurance coverage and elect to participate in an ERISA-covered plan. The court held that the Plaintiff's state law fraudulent inducement claim against the insurance agent was not preempted because it did not "relate to" an ERISA-covered plan within the meaning of ERISA section 514(a). The court emphasized that the claim did not implicate the plan's administration of benefits of "affect the relations among the principal ERISA entities (the employer, the plan fiduciaries, the plan, and the beneficiaries)." See also *Hardy v. Fisher*, 901 F. Supp. 228 (E.D. Tex. 1995) (sponsor's claim alleging that insurance agent violated the Texas

Deceptive Trade Practices Act not preempted by ERISA); *Barnet v. Wainman*, 830 F. Supp. 610, 613 (S.D. Fla. 1993) (participant's state law negligence and fraud claims against insurance agent not preempted by ERISA); *Ingram v. American Chambers Ins. Co.*, 643 So.2d 575 (Ala. 1994) (participant's state law fraudulent inducement claim against insurance agent not preempted by ERISA).

Appellants' claims in this case do not seek to impose any particular benefit structure on the plan itself, nor do they interfere with the plan's administration.[5] They are not asserting any claims against the plan or its fiduciaries. Their claims allege that an insurance broker misrepresented the true cost of a replacement policy that was used to fund the plan, not that the plan itself was improperly administered or should be required to pay certain benefits. Although appellants

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[5] The claims alleged in the two cases by appellees, *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812 (9th Cir. 1992) and *Johnson v. Reserve Life Ins. Co.*, 761 F. Supp. 93 (C.D. Cal. 1991), are distinguishable. The Plaintiffs in *Greany* and *Johnson* alleged claims arising out of the administration of conversion benefits provided under ERISA-covered plans. In both cases, the courts held that these claims were preempted because they arose out of the administration of plan benefits. *Greany*, 973 F.2d at 818-19; *Johnson*, 761 F.Supp. at 95-96. Thus, neither case stands for the proposition that ERISA preempts claims against non-fiduciary insurance brokers arising out of the sale of insurance products to plans, indeed, the *Johnson* court held specifically that ERISA did not preempt a state law negligence claim against an insurance agent arising out of the failure to procure replacement insurance for an ERISA-covered plan. *Johnson*, 761 F.Supp. at 96.

appear to seek damages measured by the value of the health benefits that would have been provided under the plan in the absence of the alleged misrepresentation, that by itself is not enough to warrant ERISA preemption. See *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1406-7 (11th Cir. 1994) (plaintiffs' claim that their employer fraudulently induced them to resign from their employment was not preempted by ERISA even though their damages might include a calculation of lost pension benefits). Nor does it matter for ERISA preemption purposes that appellants' state law claims may have some indirect economic effect on ERISA covered-plans, such as by prompting insurance brokers to charge plans higher commissions. *Travelers*, 115 S.Ct. at 1679-80 (state law not preempted simply because it has an indirect economic effect on ERISA-covered plans).

We hold that, although McDonald Equipment established an ERISA-covered plan by purchasing group medical insurance for its employees, ERISA does not preempt appellants' state law claims against appellees for fraud, misrepresentation, breach of warranty, and deceptive trade practices because these claims do not "relate to" an employee benefit plan within the meaning of ERISA section 514(a), 29 U.S.C. § 1144(a).

We sustain appellants' challenge to the summary judgment.

Accordingly, we REVERSE the judgment of the trial court and REMAND for a trial on the merits.

NELDA V. RODRIGUEZ
Justice

Opinion ordered published.
Tex.R. App.P.90.

Opinion delivered and filed
this the 11th day of July, 1996.

Paul Hatchett
District Clerk, Matagorda County, State of Texas
307 Matagorda County Courthouse
P. O. Drawer 188
Bay City, Texas 77404-0188
(409) 244-7621

October 21, 1994

David L. Sheller
3000 Weslayan, Suite 370
Houston, Texas 77027

NOTICE OF FINAL JUDGMENT
OR OTHER APPEALABLE ORDER

130TH Judicial District - Matagorda County, Texas
On October 19, 1994 Judge Jo Ann Ottis signed the Order Granting Summary Judgment in Cause No. 91-S-0574-C.

Styled:

NATHAN MCDONALD, ET AL.

vs.

HOUSTON BROKERAGE, INC., ET AL.

PAUL HATCHETT, DISTRICT CLERK
MATAGORDA COUNTY, TEXAS

by (s)_____
Deputy
cc: Keith Wier

NO. 91-S-0574-C

NATHAN McDONALD, ET AL.	)	IN THE DISTRICT
	)	COURT OF
vs.	)	MATAGORDA
	)	COUNTY, TEXAS
HOUSTON BROKERAGE, INC.,	)	130TH JUDICIAL
ET AL.	)	DISTRICT

ORDER GRANTING SUMMARY JUDGMENT

On this day, came on to be heard the Motion for Summary Judgment of Defendants, HOUSTON BROKERAGE, INC., HOUSTON INSURANCE BROKERAGE CENTER, and MIKE PINKERTON, INDIVIDUALLY AND AS AN O FFICER DIRECTOR OF HOUSTON BROKERAGE, INC., MID-WEST PROPERTIES, and HOUSTON INSURANCE BROKERAGE CENTER, filed in connection with the above-entitled and numbered cause of action. The Court, having read the pleadings heard argument of counsel, and considered the motion and response, if any, is of the opinion that such motion is meritorious and should be granted. It is, therefore,

ORDERED that summary judgment is hereby in all thing GRANTED, Plaintiffs shall take nothing against Defendants, HOUSTON BROKERAGE, INC., HOUSTON INSURANCE BROKERAGE CENTER, and MIKE PINKERTON, INDIVIDUALLY AND AS AN OFFICER DIRECTOR OF HOUSTON BROKERAGE, INC., MID-WEST PROPERTIES, and HOUSTON INSURANCE BROKERAGE CENTER, and all costs are assessed against Plaintiffs, for which execution shall issue unless timely paid.

SIGNED this 19th day of October, 1993.

(s)_____
JUDGE PRESIDING

APPROVED AS TO FORM:

HUDGINS, HUDGINS & WARRICK

By (s)_____
Keith Wier
State Bar No. 21436100
24 Greenway Plaza, Suite 1007
Houston, Texas 77046
Telephone (713) 623-2550
Facsimile (713) 623-2793

THE STATE OF TEXAS)
County of Matagorda)

I, Paul Hatchett, Clerk of the District Court in and for Matagorda County, Texas, do hereby certify that the above and foregoing is a true and correct copy of Order Granting Summary Judgment in Cause No. 91-S-0574-C of the Minutes of the District Court of Matagorda County, Texas, Given under my hand and the seal of said Court, at the office in Bay City, Texas, this 31st day of October, A.D., 1994.

(s)_____
Clerk, District Court
Matagorda County, Texas
By (s)_____Deputy

(SEAL)

NO. 91-S-0574-C

NATHAN AND SHARYL McDONALD INDIVIDUALLY AND AS NEXT FRIEND AND GUARDIANS OF NATHAN NEIL McDONALD, A MINOR AND J.N. McDONALD, JR., INDIVIDUALLY AND D/B/A McDONALD EQUIPMENT	)	IN THE DISTRICT COURT OF MATAGORDA
vs.	)	COUNTY,
HOUSTON BROKERAGE, INC., MID-WEST PROPERTIES, INC., HOUSTON INSURANCE BROKERAGE CENTER, AND MIKE PINKERTON, INDIVIDUALLY AND AS AN OFFICER DIRECTOR OF HOUSTON BROKERAGE, INC., MID-WEST PROPERTIES, AND HOUSTON INSURANCE BROKERAGE CENTER	)	TEXAS 130TH JUDICIAL DISTRICT

ORDER FOR JUDGMENT NUNC PRO TUNC

ON THIS DAY came on to be heard and considered Plaintiffs' Motion for Judgment Nunc Pro Tunc, and having considered said Motion is of the opinion that said Motion is meritorious. It is therefore,

ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion for Judgment Nunc Pro Tunc is hereby GRANTED. It is further,

ORDERED, ADJUDGED and DECREED that the

Clerk will correct the clerical error made when the Court signed Defendants' Order on Summary Judgment to show the correct date of signing to be October 19, 1994, not October 1, 1993. It is further,

ORDERED that the Clerk of the Court will immediately supplement the Transcript on file with the Court of Appeals to include this Order for Judgment Nunc Pro Tunc to correct the clerical error and show the date of the signing of the judgment to be October 19, 1994, in order that Plaintiffs may proceed with their appeal of the judgment.

SIGNED this the 28th day of November, 1994.

(s)_____
JUDGE PRESIDING

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

January 10, 1997

Mr. Joe E. Luce
Hudgins Hudgins
& Warrick
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Suite 1007
Houston, TX 77046

Mr. Michael D. Hudgins
Hudgins Hudgins
& Warrick
24 Greenway Plaza
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Ms. Gina V. Fulkerson
Hudgins Hudgins
& Warrick
24 Greenway Plaza
Suite 1007
Houston, TX 77046

Mr. David L. Sheller
9 Greenway Plaza
Suite 3028
Houston, TX 77046

RE: Case Number 96-1049
Style: HOUSTON BROKERAGE, INC., HOUSTON INSURANCE BROKERAGE CENTER, and MIKE PINKERTON, individually and as an officer director of HOUSTON BROKERAGE, INC., and HOUSTON BROKERAGE CENTER

v.

NATHAN McDONALD and SHARYL McDONALD, individually, and a/n/f and guardians of NATHAN NEIL McDONALD, a minor, and J.N. McDONALD, JR., Individually and d/b/a McDONALD EQUIPMENT

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied."

Sincerely,
John T. Adams, Clerk

By(s)_____
Michael Kopp, Deputy

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

February 13, 1997

Mr. Joe E. Luce
Hudgins Hudgins
& Warrick
24 Greenway Plaza
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Houston, TX 77046

Mr. Michael D. Hudgins
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Ms. Gina V. Fulkerson
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Mr. David L. Sheller
9 Greenway Plaza
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Houston, TX 77046

RE: Case Number 96-1049
Style: HOUSTON BROKERAGE, INC., HOUSTON INSURANCE BROKERAGE CENTER, and MIKE PINKERTON, individually and as an officer director of HOUSTON BROKERAGE, INC., and HOUSTON BROKERAGE CENTER
v.
NATHAN McDONALD and SHARYL McDONALD, individually, and a/n/f and guardians of NATHAN NEIL McDONALD, a minor, and J.N. McDONALD, JR., Individually and d/b/a McDONALD EQUIPMENT

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,
John T. Adams, Clerk

By(s)_____
Michael Kopp, Deputy